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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 GAIL STRUTHERS, an individual,
12 Plaintiff,
13 vs.
14 UBS FINANCIAL SERVICES, INC., a
15 corporation; and DOES 1-10, inclusive,
16 Defendant.

CASE NO. 08-CV-1381 H (JMA)

**ORDER DENYING
PLAINTIFF'S MOTION TO
ALTER OR AMEND
JUDGMENT**

17 Plaintiff's complaint alleges several causes of action stemming from her employment
18 with Defendant UBS Financial Services, Inc. and the termination of that employment. (Doc.
19 No. 1.) On September 8, 2008, Defendant UBS Financial Services, Inc. filed its motion to
20 compel arbitration (Doc. No. 9.) based on two separate arbitration agreements signed by
21 Plaintiff. After due consideration of briefing from both parties, the Court granted Defendant's
22 motion to compel arbitration and dismissed the case without prejudice. (Doc. No. 28.)

23 On December 1, 2008, Plaintiff filed an amended motion to alter judgment. (Doc. No.
24 42.) Defendant filed an opposition to Plaintiff's motion to amend judgment on January 20,
25 2009. (Doc. No. 49.) For the following reasons, the Court denies Plaintiff's motion to alter
26 or amend the Court's judgment.

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Background

Before 2006, Plaintiff Gail Struthers worked as an Assistant Vice President, Financial Advisor for Morgan Stanley. (Struthers Decl. in Opp. to Mot. to Compel Arb. [“Struthers Decl.”], ¶ 2.) Plaintiff’s compensation exceeded \$300,000 per year. (Id.) During Ms. Struther’s employment at Morgan Stanley, she became close associates with another financial advisor, Tony Ferner. (Id. ¶ 4.) When Mr. Ferner accepted a position as a branch manager at UBS Financial Services, Inc. (“UBS”), he contacted Ms. Struthers and offered her a position as a financial advisor at UBS. (Id. ¶ 6.) Ms. Struthers decided to accept the offer.

On February 7, 2006, Ms. Struthers signed a “Letter of Understanding” (“LOU”) confirming the elements of the compensation package she would receive in her new position at UBS. (Struthers Decl., Ex. A.) That Letter of Understanding provided for Ms. Struthers to receive an Employee Forgivable Loan (“EFL”) in the amount of approximately \$396,000 forgivable over 6 years. (Id. ¶ 2.) The LOU further provided that the loan would be “subject to all the provisions of the Employee Forgivable Loan Agreement” and stated that a copy of that agreement was enclosed, incorporated by reference and made a part of the LOU. (Id.) On March 13, 2006, after Ms. Struthers had resigned from Morgan Stanley and started working at UBS, she signed the Employee Forgivable Loan Agreement (labeled “Promissory Note”). (Howard Decl. ISO Mot. to Compel Arb. [“Howard Decl.”], Ex. 1.) The Promissory Note contains an acceleration clause providing that repayment of the loan would be immediately due upon termination of employment for any reason besides disability or death. (Id. at 2.) The Promissory Note also contained an arbitration clause providing that:

[A]ny disputes between Employee and UBS Financial Services including claims concerning compensation, benefits or other terms or conditions of employment and termination of employment, or any claims for discrimination, retaliation or harassment, or any other claims whether they arise by statute or otherwise . . . will be determined by arbitration as authorized and governed by the arbitration law of the state of New York.

(Id. at 5.)

Ms. Struthers also executed a “Form U-4 Uniform Application for Securities Industry Registration or Transfer” (the “U-4”) in order to register with the NASD. (Howard Decl., Ex. 2.) This registration is required under a 1993 Securities and Exchange Commission (“SEC”) regulation that requires all broker-dealers to be registered with a securities organization such as the NASD. 17 C.F.R. § 240.15b7-1. The U-4 form contains an arbitration clause that covers Ms. Struther’s claims. (*Id.* at 12, ¶ 5.)

On May 15, 2007, UBS terminated Ms. Struthers’s employment. (Struthers Decl. ¶ 17.) Plaintiff argues that she should not have to pay back her Employee Forgivable Loan because her termination was due to disability. She further asserts several causes of action stemming from her employment with UBS, including (1) intentional misrepresentation; (2) negligent misrepresentation; (3) violation of plaintiff’s rights under the California Fair Employment and Housing Law; (4) invasion of privacy; (5) intentional infliction of emotional distress; (6) breach of implied covenant of good faith and fair dealing; (7) partial rescission; and (8) unlawfully preventing employment by misrepresentation.

Discussion

I. Motion to Alter Judgment – Legal Standard

Under Rule 59 of the Federal Rules of Civil Procedure, a party may file a motion to alter or amend a judgment no later than 10 days after the entry of the judgment. Fed. R. Civ. P. 59(e). Amendments to judgments under Rule 59(e) are appropriate “if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.” *Dixon v. Wallowa County*, 336 F.3d 1013, 1022 (9th Cir. 2003) (quoting *Sch. Dist. No. 1J, Multnomah County, Or. v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

Here, Plaintiff’s motion raises no argument that there has been an intervening change in controlling law. Similarly, while Plaintiff presents additional information regarding the state action issue, Plaintiff does not explain why this information could not have been discovered earlier through due diligence, as required for a Rule 59 motion based on new evidence. *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001) (“a party that fails to

1 introduce facts in a motion or opposition cannot introduce them later in a motion to amend by
 2 claiming that they constitute ‘newly discovered evidence’ unless they were previously
 3 unavailable”). Therefore, Plaintiff’s motion to amend the Court’s judgment depends on
 4 Plaintiff’s argument that the Court committed clear error or the initial decision was manifestly
 5 unjust. Id. In evaluating Plaintiff’s arguments, the Court bears in mind that “legal arguments
 6 made for the first time on a motion to amend” are properly disregarded. Id.

7 **II. Motion to Compel Arbitration – Legal Standard**

8 The Federal Arbitration Act provides that any arbitration agreement “evidencing a
 9 transaction involving commerce” shall be “valid, irrevocable, and enforceable.” 9 U.S.C. §
 10 2. When one party to such an agreement refuses to arbitrate a dispute, the other party may
 11 petition a federal court to compel arbitration. Id. at § 4. If the court determines that (1) a valid
 12 agreement to arbitrate exists and (2) the agreement encompasses the dispute at issue, the court
 13 must enforce the agreement and compel arbitration. Chiron Corp. v. Ortho Diagnostic
 14 Systems, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000).

15 In the Ninth Circuit “[i]ssues regarding the validity or enforcement of a putative
 16 contract mandating arbitration should be referred to an arbitrator.” Sanford v. Memberworks,
 17 Inc., 483 F.3d 956, 962 (9th Cir. 2007). Only “challenges to the existence of a contract as a
 18 whole are determined by the court prior to ordering arbitration.” Id.

19 Generally, “questions of arbitrability must be addressed with a healthy regard for the
 20 federal policy favoring arbitration” and “any doubts concerning the scope of arbitrable issues
 21 should be resolved in favor of arbitration.” Moses H. Cone Mem’l Hosp. v. Mercury Constr.
 22 Corp., 460 U.S. 1, 24-25 (1983).

23 **III. The Promissory Note Arbitration Clause**

24 The Promissory Note’s arbitration clause provides that New York state law will govern
 25 any arbitration. (Howard Decl., Ex. 1 at 5.) Federal courts sitting in diversity look to the law
 26 of the forum state in making a choice of law determination. Ticknor v. Choice Hotels Int’l,
 27 Inc., 265 F.3d 931, 937 (9th Cir. 2001). In this case, because the complaint was filed in
 28 California, California’s choice of law rules apply. When faced with a contractual choice of

1 law provision, California courts apply the test set forth in Nedlloyd Lines B.V. v. Superior
 2 Court, 3 Cal.4th 459, 465 (Cal. 1992). Under Nedlloyd, the Court must first determine (1)
 3 “whether the chosen state has a substantial relationship to the parties or their transaction” or
 4 (2) “whether there is any other reasonable basis for the parties’ choice of law.” Id. If either
 5 test is met, the Court must next determine “whether the chosen state’s law is contrary to a
 6 *fundamental* policy of California.” Id. (emphasis in original). If no fundamental policy is
 7 violated, the Court will enforce the parties’ choice of law.

8 In this case, the Nedlloyd test is met and the choice of law provision is enforceable.
 9 When Plaintiff signed the promissory note, New York state was Defendant UBS’s principle
 10 place of business. (Bird Decl. ISO Mot. to Compel Arb. [“Bird Decl.”] ¶ 2.) The Court
 11 concludes that this fact constitutes a “reasonable basis for the parties’ choice of law.”
 12 Nedlloyd, 3 Cal.4th at 465. Thus, the choice of law provision is enforceable unless New
 13 York’s law is contrary to a fundamental policy of California. Id. Though Plaintiff has
 14 demonstrated several material differences between New York and California contract law, the
 15 Court is not convinced that these differences render the choice of law provision unenforceable.
 16 If the existence of such differences were enough to nullify a choice of law clause, these
 17 agreements would have little force. Accordingly, the Court applies New York state law with
 18 respect to the Promissory Note’s arbitration clause.

19 Plaintiff’s objection to the arbitration clause involves her claim that the Promissory
 20 Note was executed as a result of fraud and duress. (FAC ¶¶ 9, 67-72.) Under New York law,
 21 a claim of economic duress requires that “the complaining party was compelled to agree to [the
 22 contract] by means of a wrongful threat which precluded the exercise of its free will.” Stewart
 23 M. Muller Const. Co., Inc. v. New York Tel. Co., 40 N.Y.2d 955, 956 (N.Y. 1976). Plaintiff
 24 has not alleged that UBS made any threat to induce her to sign the Promissory Note. Further,
 25 because Plaintiff accepted the Employee Forgivable Loan and did not timely repudiate the
 26 agreement, she cannot assert an economic duress claim now to avoid a specific clause of the
 27 agreement. See, Bank Leumi Trust Co. of New York v. D’Evoli Int’l, Inc., 558 N.Y.S.2d 909,
 28 914 (N.Y. App. Div. 1990).

1 Plaintiff further argues that the Promissory Note's arbitration clause should not be
 2 enforced because she had no notice of that provision until after she resigned from Morgan
 3 Stanley. (FAC ¶ 68.) Plaintiff has not alleged sufficient facts to raise a genuine issue as to her
 4 fraud claim. On February 7, 2006, before she resigned from Morgan Stanley, she signed an
 5 LOU which states that it was accompanied by UBS's Employee Forgivable Loan Agreement.
 6 (Struthers Decl. Ex. A, ¶ 2.) Even if the Employee Forgivable Loan Agreement was not the
 7 Promissory Note itself, but was instead the document attached as Exhibit B to Plaintiff's
 8 Declaration, this document explicitly refers to the Promissory Note in connection with the
 9 issuance of the Loan. (Struthers Decl. Ex. B.) Therefore, Plaintiff's alleged facts do not raise
 10 a genuine issue as to her fraud claim for purposes of this motion.

11 Moreover, Plaintiff's allegations of fraud and duress are not specifically directed at the
 12 arbitration clause, but apply to the entire Promissory Note. Plaintiff's First Amended
 13 Complaint seeks rescission of the entire Promissory Note, with the exception of terms
 14 regarding the loan, payment, and forgiveness. (FAC ¶ 72.) The Ninth Circuit has held that the
 15 existence of fraud in the inducement and economic duress as to an agreement as a whole
 16 remains a question for the arbitrator. Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 726 (9th Cir.
 17 1999). Therefore, even if Plaintiff's fraud and duress claims were not governed by New York
 18 law, they are not sufficiently targeted at the arbitration clause to require a trial before
 19 arbitration.

20 Accordingly, the Court concludes for purposes of this motion that the Promissory Note
 21 signed by Plaintiff contains a valid arbitration clause. The scope of the clause itself is not in
 22 dispute. Because Plaintiff's claims stem from her employment at UBS, those claims are
 23 covered by the language of the arbitration clause. However, even if the arbitration clause of
 24 the Promissory Note is invalid, Plaintiff is still compelled to arbitrate based on the arbitration
 25 clause in her NASD Form U-4.

26 **IV. The Form U-4 Arbitration Clause**

27 Plaintiff objects to the arbitration clause in her executed U-4 form as an unconstitutional
 28 condition forcing her to choose between her right to court access and her right to pursue her

1 chosen occupation. Generally, the government may not require a person to give up a
 2 constitutional right in exchange for an unrelated discretionary benefit. Vance v. Barrett, 345
 3 F.3d 1083, 1091-92 (9th Cir. 2003). Here, Plaintiff alleges that the SEC imposed such a
 4 condition when it promulgated 17 C.F.R. § 240.15b7-1 requiring brokers to register with
 5 securities organizations. To establish state action, a plaintiff must show that the state is
 6 “responsible for the specific conduct of which the plaintiff complains.” Blum v. Yaretsky, 457
 7 U.S. 991, 1004 (1982). Here, the challenged regulation requires only that brokers register with
 8 securities organizations. The NASD itself required the arbitration agreement. Accordingly,
 9 the Court concludes that the arbitration clause in the U-4 form is valid.

10 Along with her Rule 59 motion, Plaintiff has submitted extensive research detailing the
 11 relationship between the federal government and self-regulatory organizations like the NASD
 12 in support of her argument that the U-4 Form arbitration clause constitutes state action. (Mot.
 13 at 27-53.) However, “a party that fails to introduce facts in a motion or opposition cannot
 14 introduce them later in a motion to amend by claiming that they constitute ‘newly discovered
 15 evidence’ unless they were previously unavailable.” Zimmerman, 255 F.3d at 740.

16 Plaintiff has not cited any controlling authority holding that such a clause is state action
 17 in this context. Additionally, the Supreme Court has enforced a similar arbitration agreement.
 18 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991). In this case, the Court is
 19 similarly confident that arbitration is appropriate and adequate.

20 **V. Plaintiff’s Arguments Against Application of the Federal Arbitration Act**

21 In an attempt to avoid any application of the Federal Arbitration Act (“FAA”) to this
 22 case, Plaintiff claims that she is exempt under Section 1 of the Act, which excludes from
 23 coverage “contracts of employment of seamen, railroad employees, or any other class of
 24 workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1. Plaintiff argues that,
 25 because her function at UBS was to buy and sell securities on the national exchanges, she
 26 engaged in transportation of those securities in interstate commerce. (Mot. at 86.) The
 27 Supreme Court has rejected similar attempts to expand the exemption clause of Section 1. In
 28 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), the Court held that the exemption

1 clause should be read narrowly in light of the specific examples it provides. Id. at 114-15. In
2 so holding, the Court relied on the maxim ejusdem generis, the statutory canon that “where
3 general words follow specific words in a statutory enumeration, the general words are
4 construed to embrace only objects similar in nature to those objects enumerated by the
5 preceding specific words.” Id. (internal quotes omitted). Restricting the general language of
6 the exemption based on its context, the Court concluded that “Section 1 exempts from the FAA
7 only contracts of employment of transportation workers.” Id. at 119. The Court reasoned that
8 Congress probably excluded such workers from the FAA “for the simple reason that it did not
9 wish to unsettle established or developing statutory dispute resolution schemes covering
10 specific workers.” Id. at 121. In light of the Supreme Court’s narrow reading of the statutory
11 exemption, this Court is unpersuaded that Plaintiff’s securities trading activity renders her a
12 transportation worker.

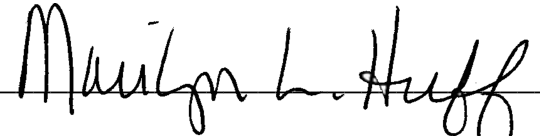
13 Finally, Plaintiff argues that the FAA as applied by the Federal Judiciary is
14 unconstitutional. (Mot. at 55-85.) Plaintiff’s motion admits that no case law supports this
15 contention, asserting that her argument is a matter of first impression in the federal courts.
16 (Mot. at 55.) Accordingly, the Court declines to adopt Plaintiff’s argument that the FAA is
17 unconstitutional as applied to parties who do not wish to arbitrate, especially where Plaintiff
18 did not raise this argument until her instant motion. Zimmerman, 255 F.3d at 740.

19 Conclusion

20 Plaintiff has not shown that the Court’s previous ruling was clearly erroneous.
21 Accordingly, the Court denies Plaintiff’s motion to alter or amend the judgment.

22 IT IS SO ORDERED.

23 DATED: May 7, 2009

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MARILYN L. HUFF, District Judge

UNITED STATES DISTRICT COURT